Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION

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MOTION TO AFFIRM

The Appellee moves the Court to affirm the judgment of the court below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the constitutionality of Neb. Rev. Stat. § 83-180 (1) (Reissue 1976) as applied to the plaintiff-intervenor Larry D. Jones.

The statute provides for the involuntary transfers of persons sentenced to the Department of Correctional Services to a term of years, to the Lincoln Regional Center, a mental hospital, not within the Department of Correctional Services, but within Department of Public Institutions. The statute provides for such involuntary transfers without any formal notice or hearing or any other safeguard, other than determinations by one or more psychiatrists that the persons suffer from a mental disease or defect, and could not be given proper treatment within the Department of Correctional Services.

The appellants have appealed from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring Neb. Rev. Stat. § 83-180 (1) to be unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The Fourteenth Amendment to the Constitution of the United States forbids any state to "deprive any person of . . . liberty . . . without due process of law."

The court below, in recognizing that due process is a flexible concept, chose to use the analytical framework set out by this Court in the case of *Matthews v. Eldridge,* 424 U. S. 319, 334-335 (1976) which suggested:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg v. Kelly, supra,* at 263-271."

The court below closely evaluated plaintiff's private interest of his avoidance of being stigmatized and labeled mentally ill, and his avoidance of a more controlled confinement, which would include behavior modification through the use of drugs. The court felt the risk of an erroneous deprivation of these private interests to be high. After balancing these and the state's interest the court merely made a factual determination that the involuntary transfer in question was tantamount to a major

change in the plaintiff's condition of confinement which amounted to a grievous loss. Due process therefore attached to the plaintiff's liberty interest.

Minimal due process requirements were then ordered by the court below based upon the case of *Morrissey v. Brewer,* 408 U. S. 471 (1972), which involved an analagous parole revocation. Availability of counsel was also deemed necessary by the court because of the disabilities which accompany the mentally ill.

The opinion of the court below merely followed the direction of this Court as set down by its earlier decisions.

Counsel for the appellant has argued that the court below was bound by the holdings of *Meachum v. Fano,* 427 U. S. 215 (1976) and *Montayne v. Haymes,* 427 U. S. 236 (1976). These cases are clearly inapplicable to the case at hand as they dealt with involuntary transfers from one prison to another, and did not treat the issue of the constitutionality of an involuntary transfer from a state prison to a state mental hospital. Even if the cases are remotely applicable, the case at hand clearly comes within the exception noted in *Meachum, supra.*

The thrust of the opinion below is also consistent with the opinions set forth in:

Baxstrom v. Herold, 383 U. S. 107 (1966).

U. S. ex rel. Schuster v. Herold, 410 F. 2d 1071 (2nd Cir. 1969).

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977).

even though the similar issues were resolved through an equal protection analysis.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to affirm the judgment entered in the cause by the United States District Court for the District of Nebraska.

Respectfully submitted,

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